No. 8993

IN THE

United States Circuit Court of Appeals

KANSAS CITY LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

BERTHA E. BOWMAN,

Appellee.

Brief of Appellee

Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

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STATEMENT OF THE CASE

The statement of the case made by appellant is substantially correct, except the statement of the facts surrounding the death of the insured is incomplete and omits some very material evidence bearing upon the case. In view of which we deem it necessary to make a succinct statement of the facts shown by the record.

John D. Bowman died February 16, 1937, from gun-shot wound. He was a resident of Blackfoot, Idaho, at the time of his death and was survived by his wife Bertha E. Bowman, with whom he had been married for thirty-five years and had lived in Idaho twenty-two years, at Riverside and Blackfoot, and since 1934 at Blackfoot. Their children were grown; they had one son who was in college at the time of the accident. Mr. Bowman was engaged in farming. His family relationship was good and he had always been very devoted to his wife and kind during the whole of their married life.

His financial condition was good as he never did go in debt and was not in debt at the time of his death (p. 75). On December 1, 1935, deceased, John D. Bowman, suffered a stroke or cerebral thrombosis. Cerebral thrombosis is a clot on the brain which produces an action akin to paralysis and does produce paralysis depending on the amount of damage to the brain tissue and on the pressure (p. 81) or the edema. If there is an actual destruction of the brain tissue or the nerve cells they never regenerate, but if the paralysis is through edema they will gradually come back as the pressure is released. Where there is a good recovery it demonstrates that there was not much destruction of the brain cells (p. 82). There was a good recovery in this case (p. 82).

His right side was paralized and he was confined to bed about six or seven weeks. After he got out of bed he continued to improve up until the day of his death (p. 75). At the time of his death his physical condition was perfect with the exception of his speech and his right hand (p. 76), and he was about the same weight he was before his illness, having regained his normal weight (p. 49); he couldn't grasp things like he did before his sickness, his grip wasn't as good with his right hand (p. 47), and at times he dropped objects and especially dishes when he was wiping them (p. 76). He had a rather pronounced speech impediment and difficulty with his right hand (p. 79). After he was able to be out of bed he did many things around the home: He milked the cows and chopped the kindling, shovelled snow (p. 78), did other chores consisting among other things, in feeding and watering horses, cows, calves, and milking cows. The decedent at times

went up in the loft of the barn to feed hay to the stock (p. 51). In addition, he would do most everything around the farm. In the summer of 1936, after the stroke, he did some irrigating; he supervised all of the irrigating (p. 46); drove the derrick team for about two hundred tons of hay (p. 53); helped with the threshing and repairing of machinery; drove the Plymouth car around the farm practically all summer (p. 53).

After the stroke he spent his evenings listening to radio, reading the papers, going to shows, entertainments and political rallies, and always went to Blackfoot, about a mile from their home, twice a week, on Wednesdays and Saturdays, to the barber shop, and nearly always walked. At numerous times he talked about his physical condition (p. 76) and stated that he was better and went through movements to show how his arm was better and how much stronger and better it was (p. 77), and told his boys in the presence of his wife that he wanted to help them with the crops in the spring of 1937, and planned to take a trip with his wife to California in June as soon as their son was out of college (p. 76). He stated he was going to help the boys run the farm the coming summer (pp. 46, 53).

The day before his death the decedent, John D. Bowman, hitched up some colts to break, and helped repair a sleigh tongue (p. 53).

On the day of his death he got up and made the fires and after breakfast went to the barnyard to help haul some hay (p. 77).

There were a lot of birds around the barn and around the feed lot adjoining the barn and in the loft of the barn (p. 47), and the decedent had a custom of shooting birds on the farm (p. 76). He shot birds at the place where they were living in the winter of 1934 (p. 76). There were two guns in the house of decedent after the stroke, one a twenty-two caliber and the other Exhibit 1. The twenty-two was always in decedent's house and there were twenty-two shells always there for it but the decedent never kept any shotgun shells in the home at any time (p. 77). The shotgun, Exhibit 1, was not always in the house. It was loaned to members of the family part of the time (p. 76) and it would be brought back and put where it was always kept in the clothes closet (p. 77). It was in the decedent's house during the summer he was recovering from the illness (p. 77), but it was not there for about six weeks before the decendent got it on the date he was killed. It was at that time being used to shoot birds on the feed yard adjoining the barn about every day (p. 79). The decedent was at home alone from time to time and for as much as three days at a time during his convalescence (p. 77).

The gun, Exhibit 1, was found by the family of the decedent on the Lincoln Creek divide in a damaged condition and the stock thereof was afterward repaired (p. 50). It is a twelve-gauge Winchester repeating shotgun. After the decedent's death it was bought by Barris from the Boyle Hardware and was taken apart and cleaned. The works of the gun were all gummed with hard grease and grit and it was corroded (p. 52).

The day of his death, February 16, 1937, the decedent was in his home at noon, ate a hearty dinner, helped his wife clear up the table and wiped the dishes (p. 77). At about 1:30 he went to his son's home, which is about two hundred or two hundred fifty feet northwest of the barn, and got the shotgun, Exhibit 1 (p. 43). He appeared as he always did, cheerful and smiled all the time. He was informed by his daughter-in-law Verna A. Bowman that there were no shells for the gun. As he left the house with the shotgun, Exhibit 1, birds flew out of the trees and he motioned to the birds flying around from the trees and said, "Birds" (p. 44).

About 1:30 or 2:30 in the afternoon he was seen just inside the barnyard gate between the house of Bertram M. Bowman and the barn taking the gun toward the house of decedent (p. 46). About 2:30 the same afternoon he was at the store of the Clegg Furniture Company in Blackfoot, Idaho, and was seen by Brigham Horrocks who was in the merchandising business under the name of Clegg Furniture Company. Mr. Horrocks stated that decedent took two twelve-gauge shotgun shells without waiting to be served. The decedent was familiar with the store, having previously worked there for about a month in the winter. When decedent showed Horrocks the two shells Horrocks said to him, "You don't want them. Leave them here," in a kidding way. Mr. Horrocks stated, "I always kidded with him and he did with me," and that "there was nothing unusual in this. He told me he was shooting birds and I knew it was his custom." The decendent said, "I am going to shoot birds." It was the habit (p. 59) of decedent to buy shotgun shells two or three at a time and

never more than a quarter's worth. This continued over a period of five years or longer than that (p. 60). It was the custom of the decedent to wait upon himself if there was no one ready to wait upon him (p. 60).

The decedent was next seen by Verna A. Bowman on the day of his death about 3:30 going towards the barn. She was at the chicken coop at that time and was in the process of changing straw. There was no obstruction between the chicken coop and the barn to prevent a person from seeing from one place to the other (p. 45). About five minutes from the time she saw the decedent going toward the barn she heard a shot coming from the direction of the barn and noticed birds flying in all directions. She went to the house and later heard another shot fired about twenty minutes after the first shot. It also came from the direction of the barn (pp. 45, 70). There were two houses to the north of the barn and she lived in the one to the south. The barn was south and east of her house and the chicken coop diagonally to the south between the barn and the house (p. 45).

Deceased was found in the hay loft of the barn back of the sugar factory at Blackfoot, Idaho, at about 4:20 that same afternoon by John N. Barnard (p. 61), who, in tracing the source of the blood on the back of his horses which had been kept in some stalls in the barn, went to the hay loft and found Mr. Bowman lying on his back in the southwest corner of the hay loft just under a window which had no glass in it. He did not examine the body at that time but notified one of the Bowman boys of the accident, who in turn notified

the sheriff and coroner. The sheriff, coroner, Jack Gibbs, two of the Bowman boys and John Barnard went to the hay loft of the barn. The body was in the same position and condition when the coroner arrived (p. 61), about 5:00 o'clock (p. 65) as it was when first seen by Barnard.

They found the body of the decedent lying on his back in the southwest corner of the barn near the window, his head to the southeast not quite in line with the barn (p. 62), his feet were about one and a half feet from the west wall and a little north—about four inches—of the southwest window (pp. 54, 62).

The gun was lying diagonally across the body near the feet. The butt was near the feet but not quite in line with the body (p. 65), and the muzzle pointed towards the left side of his head and still lying on his chest (pp. 63, 65). There was an empty shell to the right of the body and another empty shell which was extracted from the gun (p. 65). There was no contrivance of any kind that could be used there at all (p. 65, 94). The only thing found around the body was a piece of 2" x 4", which was three or four feet long with some alfalfa leaves on it (p. 94) which was south and east of the body, which had not been used for any purpose as the leaves had not been disturbed (p. 95).

When the gun was picked up a little piece of flesh was in the muzzle and fell out when the sheriff tipped the gun up and there were blood stains on the gun (p. 88). The trigger hammer was down pressing the firing-pin against the shell.

The decedent Bowman had been shot in the left side of

his face (p. 65). Part of the chin and the jaw bone on the left side had been shattered and the left side, extending to the eyes, was pretty well torn away (p. 67). The wound was the entire length of the left side of the face from the chin clear up past the eye (p. 68). The eye was dropping out of the socket a little. The cause of that was possibly a destruction of the muscle of the cheek bone which was depressed. It was in the area of the external wound on the left side of the face in the same place (p. 81). The left side of his face was pretty well shot away indicating that the shot had probably been under the left side of the chin where the shot first went in (p. 66). The roof of the mouth was in about five different pieces (p. 85) still connected together by some connecting tissue. They were not wholly destroyed, there being enough to distinguish that it was the roof of the mouth (p. 86).

The upper plate of the decedent's artificial teeth was all there and intact. The teeth were all there on the right side but on the left some of the teeth were broken or chipped with part of the teeth still in the plate (p. 101-102). The lower plate was broken to pieces in several places and lying with the mangled part of his face (p. 89). Neither plate was in his mouth, the upper plate being to the left of his face and right along the torn part of his face (p. 90).

There was a little of the skin of the mouth visible. There was no flesh noticed down underneath the jaw (p. 73).

The ceiling was bare and a little to the left and over the body was the pattern of a charge of shot that had entered the roof at the juncture of the rafter and the cross-member (p. 88).

The shot pattern on the ceiling was almost directly over decedent's feet (p. 56).

There were particles of flesh and blood where the shot took effect in the barn and also particles of the blue denim jumper embedded at that place and particles of flesh spattered about. There were no other shots that took effect in the barn (p. 72).

There were no marks or wounds on the right side of the decedent's face except the right jaw bone which protruded through the skin about three inches between the point of the chin and the right ear. The head of the deceased was loose to the touch and not solid (p. 85).

There was a friction mark or what might be called an abrasion along the left side starting at the nipple and terminating at the collar bone.

The body was taken to the mortuary. It was dressed in a jumper (Exhibit 3) and sweater that was under the jumper, usual underwear (p. 66), khaki pants, shoes (Exhibit 2) on with rubbers on over the shoes, and an ordinary gray work shirt (p. 63). The shoes (Exhibit 2) were in the same condition as they were at the time of the death of the decedent (p. 57). The denim jumper had two holes in it. The shot looked as if it had struck the left side of his coat and gone into his chin and took the left side of his face off (p. 63). The shot that went through his face would have to go through the hole in his jumper before it hit his face (p. 93).

The barn is a frame structure about 28' x 46'. It has a gable roof and tie arms across the rafters. It is about ten feet from the hay loft floor to the tie arms. There are two

windows in the west and two in the east and a large hay door between the east two. The windows are between two to three feet square and are about four and a half feet from the floor of the loft of the barn and have no glass in them. The oat granary is back of the barn on the west side down below the southwest window with a lean-to roof to the south and the doors to this granary were never very tight for birds would always fly out of there. There was also a wheat granary where seed wheat was stored and birds could get in there to some extent (p. 48). Access to the loft of the barn was gained by a perpendicular ladder on the north side of the barn to reach the loft (p. 54).

Melvin Bowman is 5' 6" tall, and compared with his father John D. Bowman, there is not the fraction of an inch difference in the two of them. Their build is practically the same; their arms were about the same length (p. 54); they are the same dimensions generally. Melvin Bowman stepped down from the witness box in front of the jury and the stock or butt of the gun, Exhibit 1, was placed on the floor by his feet with the gun in nearly a perpendicular position to the floor in line with his body with the muzzle or end of the barrel pointing upward along side his left breast, and in this position he was requested to reach the trigger with his finger, but the witness was unable to reach the trigger with his finger while the gun was in this position without bending his body. With the gun in the same position he then bent over and pressed the trigger with his finger and in so doing the muzzle or end of the barrel extended above the top of the left shoulder of the witness (p. 57).

POINTS AND AUTHORITIES

The weight, sufficiency or probative force of the evidence is for the jury.

Gold Hunter Mining & Smelting Co. vs. Johnson, 233 F. 849, 147 C. C. A. 523;

Supreme Lodge K. of P. vs. Beck, 181 U. S. 49; 45 L. Ed. 741.

The court is justified in directing a verdict only when the testimony will not support any other verdict.

U. S. Fidelity & Guaranty Co. vs. Blake, 285 F. 449; certiorari denied, 43 S. C. Ct. 523; 262 U. S. 748;

Tipsword vs. Potter (Idaho), 174 Pac. 133;

Smith Booth Usher Co. vs. Detroit Copper Mining Co. of Ariz., 220 F. 600, 136 C. C. A. 58;

Southern Pac. Co. vs. U. S., 22 F. 46, 137 C. C. A. 584;

McAlinden vs. St. Maries Hospital Ass'n, 156 Pac. 115, 28 Ida. 657;

Gamer vs. N. Y. Life Ins. Co., 76 F. (2d) 543;

N. Y. Life Ins. Co. vs. Gamer, 303 U. S. S. Ct. 161, 82 L. Ed. 480-484.

In actions on double indemnity clause of life policy where death of insured can be accounted for upon any reasonable hypothesis other than suicide, case for jury.

Gamer vs. N. Y. Life Ins. Co., 76 F. (2d) 543;

Conn. Gen. Life Ins. Co. vs. Maher, (C. C. A.) 70 F. (2d) 441-445.

In determining whether or not evidence is sufficient to submit the case to the jury the court will assume that the jury will take the view most favorable to opposing party.

N. Y. Life Ins. Co. vs. Gamer, 303 U. S. S. Ct. 161, 82 L. Ed. 480-484;

Gamer vs. N. Y. Life Ins. Co., 76 Fed. (2d) 543;

Gamer vs. N. Y. Life Ins. Co., 90 Fed. (2d) 817.

Inferences from evidence where fair minded men might honestly differ as to the conclusion to be drawn from facts whether controverted or not, the question at issue is for the jury.

Adams vs. Bunker Hill & Sullivan Min. Co., (Idaho), 89 Pac. 624;

Brown vs. Jaeger, (Idaho) 271 Pac. 464.

Evidence reasonably tending to prove, either directly or by permissible inferences, the essential facts, is sufficient to sustain verdict of the jury.

Midland Valley R. Co. vs. Goble, 186 Pac. 723;

Missouri O. & G. Ry. Co. vs. Smith, 155 Pac. 233;

Ruerat vs. Stevens, (Conn.) 155 A. 219;

Brooks-Bischoffberger vs. Bischoffberger, (Me.) 149 A. 606;

Buttrick vs. Snyder, 210 N. W. 311 (236 Mich. 300).

Facts from which another fact may be rationally inferred are evidence of that fact.

Olberg vs. Kroehler, 1 F. (2d) 140;

Perry vs. Johnson Fruit Co., 243 N. W. 655 (Nebr.);

Nardone vs. Public Service Electric & Gas Co., 174 A. 745 (N. J.)

If there is any doubt as to the inferences to be drawn from the evidence, it is for the jury.

Rhoads vs. Herbert, (Pa.) 148 A. 693-694.

Finding reasonably inferable from facts and conditions directly proved is "legal evidence" and not mere conjecture.

Horrick vs. Bethlehem Mines Corp., 161 Atl. 75, (307 Pa. 264).

The plaintiff is not bound to prove by eye-witnesses that the injuries which caused insured's death were accidental, but the fact may be shown by circumstantial evidence.

Wilkinson vs. Aetna Life Ins. Co., (Ill.) 88 N. E. 550;

U. S. Fidelity & Guaranty vs. Blum, (C. C. A.) 270 F. 946;

Cooley's Briefs on Insurance, Vol. 6, p. 5287;

Gamer vs. N. Y. Life Ins. Co., 76 F. (2d) 543.

Experimental evidence depends for its value on the fact that the experiment has been made when the conditions affecting the result are as nearly as may be identical with those existing at the time of and operating to produce the same effect.

People vs. Woon Tuck Wo., (Cal.) 52 Pac. 833;

Maris vs. Crummey, (Cal.) 204 Pac. 259;

22 C. J. Page 758, Sec. 852;

American Bell Tel. Co. vs. Nat'l Tel. Mfg. Co. 109 F. 976.

ARGUMENT

While appellant makes eight separate assignments of error, it is conceded in appellant's brief, at Page 9, that they are all to the same effect, that there is no evidence to prove that Bowman's death was accidental. Appellant devotes its entire argument in its brief to assignment six.

> "That the evidence was and is insufficient to support a verdict for the plaintiff in excess of $2,500 and accrued interest thereon for the reason that there is no evidence that the insured John D. Bowman came to his death by accidental means."

It will be observed by Page 19 of appellant's brief that the argument made in support of assignment No. 6 is adopted for the remaining assignments of error, to wit:

> "1. The court erred in denying defendant's motion for nonsuit at the close of the plaintiff's case.
>
> "2. The court erred in denying defendant's motion for a directed verdict at the close of all of the evidence.

"3. The court erred in denying defendant's motion for a new trial.

"4. That the verdict of the jury was and is contrary to the evidence.

"5. The judgment of the court entered hereein is contrary to the law.

"7. That the verdict of the jury is contrary to the evidence for the reason that taking the evidence as a whole, the physical facts are such that they conclusively establish that John D. Bowman's death resulted from suicide.

"8. The court erred in entering judgment against the defendant and in favor of plaintiff for the reason that there is no evidence in the record to support said judgment, and that said judgment is contrary to the evidence and contrary to the law, and that the evidence does not, as a matter of law, justify a judgment in favor of plaintiff."

EVIDENCE SUFFICIENT TO SUPPORT VERDICT

The courts attention is called to the fact that on the day of the death that the decedent's body was found at the southwest window of the barn with his feet within about eighteen inches of the west wall and the north side of the window, with his head lying in a southeasterly direction, with one empty shell lying near him and the other in the gun which was lying on his body. There were two holes in the jumper decedent was wearing in the left side near the breast and there was a wound in the left side of his face showing that the shot had entered under the left part of his chin and gone along the side of his face and into the rafter and cross-pieces of the ceiling almost directly over the feet of the decedent. The fact that there were shreds and particles of the blue denim jumper worn by the

decedent in the shot pattern above in the ceiling showed that the shot which passed through the blue denim coat was the shot that struck the left side of the decedent's face and entered the ceiling above.

The fact that no other shot took effect in the barn leads reasonably to the conclusion that the first shot was fired through the open window, and that the second shot which occurred some twenty minutes after the first shot, was the shot that inflicted the wound in decedent's face and killed him.

The evidence further discloses there was no contrivance around the body of the decedent by which the trigger could have been pressed or touched by the decedent. The shape and size of the shoes and rubbers over them, Exhibit 3, worn by the decedent were such that the decedent could not have pressed the trigger by his foot. Moreover, the record discloses (p. 57) that Melvin Bowman, son of the decedent, who was practically the same height and build as the decedent, with arms about the same length (p. 54), made a demonstration of the gun, Exhibit 1, before the jury to determine whether it would be possible for the decedent to have pressed the trigger of the gun with his finger and received the wound that was inflicted. In making the demonstration, the stock or butt of the gun was placed on the floor by his feet, with the gun in a perpendicular position to the floor in line with his body with the muzzle or end of the barrel pointing upward along the side of his left breast, and while in this position he was unable to reach the trigger with his finger without bending. He then bent over and pressed the trigger with his finger and while he was in this

position the muzzle or end of the barrel extended above the top of his left shoulder (p. 57), which conclusively demonstrated to the jury that the decedent could not have touched the trigger of the gun with his finger, and from such proven facts the jury could and would naturally infer that the gun was discharged accidentally.

Evidence reasonably tending to prove, either directly or by permissible inferences, the essential facts, is sufficient to sustain a judgment.

Midland Valley Ry. Co. vs. Goble, 186 Pac. 723;

Missouri O. & G. Ry. Co. vs. Smith, 155 Pac. 233.

Facts from which another fact may be rationally inferred are evidence of that fact.

Olberg vs. Kroehler, 1 F. (2d) 140.

In the case of Butrick vs. Snyder, (Mich.) 210 N. W. 311, the court in its opinion, commencing at the bottom of p. 312, said:

> "While it is true that a verdict may not rest upon bare conjecture (Fuller vs. Ann Arbor Railroad Co., 141 Mich. 66, 104 N. W. 414), it is also true that a finding as to a particular fact may be based upon inferences fairly drawn from other facts established by proof. Waidelich vs. Andros, 182 Mich. 374, 148 N. W. 824. The burden was on the plaintiff to prove that the dynamite caps were left in the tool shed by defendant's employees. If unable to furnish positive evidence of this fact, he might establish it by circumstantial proof of such a nature as would create a probability sufficiently strong to lead the jury to conclude that such

was the fact. Dunbar vs. McGill, 64 Mich. 676, 31 N. W. 578. The reasonable inferences which may be drawn from the affirmative facts proven are evidence, and not presumptions.

"Applying these rules to the proofs submitted, we are of the opinion that the finding of the jury that the dynamite was left in the shed by the stone company did not rest on conjecture."

It is contended in the brief of appellant, at p. 18, that the gun could not have been discharged accidentally, as shown by a test made in the sheriff's office in the evening of the same day. In this connection the record shows that the only test made was by cocking the gun and dropping it several times to the floor a distance of one foot to see if the jar would set the gun off, and by such test the gun did not go off (p. 88).

The test made in the sheriff's office had no probative value in determining whether or not the gun would go off by a jar if it were dropped against the floor a greater distance than one foot, or even one foot under different conditions.

Experimental evidence in corroboration of disproof depends for its value on the fact that the experiment has been made when the conditions affecting the result are as nearly as may be identical with those existing at the time of and operating to produce the particular effect.

People vs. Woon Tuck Wo, (Cal.) 52 Pac. 833;

Maris vs. Crummey, (Cal.) 204 Pac. 259.

The burden is on the party making the experiment to show similarity of essential conditions.

People vs. Hill, (Cal.) 56 Pac. 443;

People vs. Wagner, (Cal.) 155 Pac. 649;

22 C. J. Sec. 852, pp. 758-9.

The appellant failed to show that the conditions were similar. The test was made in the sheriff's office during winter weather (p. 58) by cocking a hammerless gun and dropping it to the floor a distance of one foot for several times. Whereas, the evidence was that the body was found in the loft of a barn, and it is not shown that the temperature was the same in the loft of the barn as it was in the sheriff's office. Nor was it shown that the floor of the sheriff's office was a bare floor such as the floor of the loft of the barn; nor whether the floor of the sheriff's office was carpeted or otherwise. It was not shown whether the firing device was in contact in the same manner or that the gun was loaded at the time of the test, or that the firing parts were in contact in the same manner as when the decedent met his death, or that the force was applied at the same angle or same distance in dropping the gun. It is apparent that the conditions were so absolutely dissimilar that the evidence offered by the test made in the sheriff's office would not show whether the gun would go off accidentally by a jar from dropping the same when the accident occurred.

The record shows that there were two shots fired and that only one load took effect in the barn, which naturally forces the conclusion that the other shot must have been fired through the open window where the body was later found. The jury had a right to conclude that a man 5' 6" tall, firing a shot

through the window, would be holding the butt of the gun against his shoulder, which would be about five feet from the floor, and holding the gun normally, waiting to fire or in the process of raising it to shoot again through the window, the butt of the gun would be from two to five feet from the floor, and that dropping the butt of the gun from such a distance would considerably more than double the force that was applied by the sheriff in the test made.

The test so made by the sheriff, although offered in evidence, was a matter for the jury to determine whether or not it had sufficient weight to be of any importance in the case.

Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence.

23 C. J. 59 Sec. 1810;

23 C. J. 173 Sec. 2007.

The record discloses that the gun, Exhibit 1, was old and that when it was taken apart after the death of decedent the mechanism and works of the gun were all gummed with hard grease and grit and that it was corroded (p. 52).

It is common knowledge that difference in temperature, whether the device is clean or dirty, whether well oiled or gummed, whether the force of contact is applied in the same direction, or with the same force, makes a difference in the operation or failure of operation of any mechanical device. Every such person knows that when the mechanism of a gun is gummed with hard grease, corroded, and full of grit, it will

not work as accurately and properly when cold as when the gun is warm.

It is contended by appellant in its brief on Page 18 that the physical facts indicate that the deceased took his own life because his face was blown from the inside outward and a piece of flesh fell from the end of the gun when the sheriff picked it up. It is submitted that such contention is fallacious for the following reasons: It is apparent that where the gun was discharged along the side of the decedent's face in such close proximity that flesh would naturally be blown in many directions, as particles of flesh were found in several places. The record does not disclose as contended by appellant that the face was blown from the inside outward. It was sought to be shown by the appellant that the muzzle of the gun was placed in the mouth of decedent, which was the theory upon which the appellant tried its case. The appellant's expert, Dr. Newton, in answer to a hypothetical question, stated (pp. 98, 99, 100) that he thought that the muzzle of the gun that brought about the damages was probably in the decedent's mouth at the time of the explosion, but the doctor stated that he had only seen one case of gunshot wound and that was in the face. He further stated that there would be an absolute destruction of the tissue where the charge of the shot took effect (p. 101), and stated that if the muzzle was in the mouth it would have broken the upper plate, yet the evidence shows that there was connecting tissues in the roof of the mouth and that the upper plate was not broken although there were some teeth chiped or broken (pp. 101-2) on the left side of the plate, confirming the fact that the shot was along the left

side of the face. Moreover, the lower plate was broken to pieces (p. 89), showing that the shot entered under the left part of the chin and went up along the left side of the face rather than in the mouth.

It having been shown by the record that the decedent could not have inflicted the wound that was found on his person either by pressing the trigger with his finger or his foot and that there were no contrivances found whereby he could have done so, the inference therefrom would be that the injury was not self-inflicted, but was accidental; such being the case, it was properly submitted to the jury, as the jury, and they alone, would have the right to draw the inferences that would flow from such evidence.

> Supreme Lodge K. of P. vs. Beck, 181 U. S. 50, 45 L. Ed. 741.

In the above case, which involved death by gunshot wound, the verdict was rendered for the plaintiff. The question before the court was whether there was sufficient evidence to sustain the verdict. On page 54 of the U. S. Report and page 746 of L. Ed. the court, having under consideration the question as to whether the deceased could have discharged the gun said:

> "There was a dispute as to whether, in view of the length of the gun and the shortness of his arm, he could have reached the trigger without the aid of a pencil or piece of wood, no trace of which was found or indeed looked for. Under those circumstances it is impossible to say that beyond dispute he committed suicide. The discharge of the gun may as well have happened from careless conduct of a drunken man as

> from an intentional act. At any rate, the question was one of fact and the jury found that he did not commit suicide and, after its finding has been approved by the trial court and the court of appeals, we are not justified in disturbing it."

In the case of Gamer vs. New York Life Ins. Co., 76 F. (2d) 543, the court, in the course of its opinion, said:

> "The question for our consideration is whether or not the death of insured can be accounted for upon any reasonable hypothesis other than suicide. Conn. Gen. Life Ins. Co. vs. Maher, (C. C. A. 70 F. (2d) 441-445)."

> "In determining whether or not the evidence is sufficient to submit the case to the jury, we must assume the jury will take the view most favorable to the appellant. The evidence as to the means of the death is entirely circumstantial."

After reviewing the evidence, the court concluded that the circumstances where such that the jury should have been left to determine whether or not the death was accidental and reversed the lower court. Upon re-trial judgment was rendered in favor of the plaintiff and affirmed by this court in the case of Gamer vs. N. Y. Life Ins. Co., 90 F. (2d) 817, and was taken to the Supreme court of the United States and reported in the case of New York Life Ins. Co. vs. Gamer 303 U. S. S. Ct. 161, 82 L. Ed. 480-484. In the course of its opinion, the Supreme Court said:

> "The Circuit Court of Appeals has twice held the evidence sufficient to sustain a verdict for plaintiff, and found that the facts brought forward at the second trial are not substantially different from those pre-

sented on the first appeal. There is no substantial controversy as to the principal evidentiary circumstances, upon which depends decision of controlling issue whether the death of insured was accidental. As we are of the opinion that the trial court erred in giving the challenged instruction, the judgment is therefore reversed; case remanded to district court where another trial may be had. We refrain from discussion of the evidence. We find it is sufficient to sustain a verdict for or against either party. Defendant was not entitled to a mandatory instruction."

THERE WAS NO MOTIVE FOR SELF-DESTRUCTION

It is contended by appellant, at page 17, that motive was not lacking, and in support of such contention it cites only a part of the evidence and draws an unreasonable inference from the fact that the decedent had suffered a stroke and had purchased certain shells on the day of the accident to shoot sparrows. The record discloses that the decedent sustained a stroke on December 14, 1935, about fourteen months prior to the date of his death, which confined him to his bed for about six or seven weeks, and after which he was up and around and continued to improve until the day of his death (p. 75). At the time of his death his physical condition was perfect with the exception of an impediment to his speech and the fact that he couldn't grasp things in his right hand as he did before the stroke (p. 47); that he had recovered to such an extent that he was doing the usual and ordinary things around the farm and home (p. 78), which included his going to the loft of the barn to feed hay long prior to the date of his

death, and that he was very pleased with his recovery (p. 76) and frequently went through movements to show how much stronger and better he was (p. 77), and was of a cheerful disposition, enjoyed his home life with his wife with whom he had been happily married for a long period of time, and was planning things that he was to do in the future on the farm and a trip that was to be taken with his wife (p. 76); that on the day of the accident he acted just the same as he always had acted; that his financial condition was good, he didn't owe any debts; that there was nothing unusual about his buying two shells on the date in question as it was his custom and practice, over a period of years, to buy shells in quantities of two, three, and not to exceed five, for the purpose of shooting sparrows; that it was not unusual for him to wait upon himself at the store; that it was his practice to shoot sparrows on the farm and never to keep any shotgun shells around the house. And the evidence discolses that the granary lying underneath the window where the body was found, as well as the loft of the barn, was usually infested with large flocks of birds; that there was grain in the granary which was a lean-to and adjoined right under where the window was located; that he had been left at home alone on different occasions when the shotgun was in the house as well as a twenty-two rifle, one time as long as three days and nights, while he was convalescing and when he was not in as good physical condition as he was at the time of his death. If he had desired to commit suicide on account of his physical condition it is reasonable to infer that he would likely have done so when his wife was away from home in Utah and before he had made such a good

recovery (p. 77). Further, he was capable of handling a gun in December because he killed a stray dog on the premises with the twenty-two. The record further discloses that birds were bothersome because they were shot on the feed yard prior to the date of his death (p. 49); in fact, he had shot birds upon the farm in the winter of 1934 and had done so on their farm at Riverside (p. 76) for a period of years before moving to Blackfoot. The record shows that he was not despondent (p. 54).

In the face of this record, it is submitted that not only was there no reason for his desiring to take his own life, but on the contrary there was every reason why he should desire to live. A significant fact is that when the decedent was going to the barn just before the first shot was fired he was seen by Verna Bowman who was at the chicken coop near the barn, and it is fair to infer that decedent could likewise have seen her. The record shows that it was twenty minutes between the first and second shots and that the shot by which the decedent was killed was the second shot. Isn't it reasonable to infer that if the decedent had intended to commit suicide that he would not have fired a shot at the birds through the window of the barn and waited twenty minutes then to have shot himself, as he knew that the first shot would naturally attract attention. When the first shot was fired birds flew in all directions and it could be reasonably inferred that he was waiting for part of the birds to come back to get into the granary, and, while he was so waiting, the gun was accidentally discharged either by the gun slipping from his hand and the butt striking on the floor with such force or under such conditions that it dis-

charged, or that the mechanism of the gun did not properly function and it was discharged, accidentally killing the decedent.

CASES CITED BY APPELLANT

It will be obesrved from an examination of the cases cited by appellant in support of the proposition that the evidence in the instant case is insufficient to support the verdict only a part of the cases so cited involve death by firearms. In order to show the dissimilarity we will briefly state the facts in such cases.

In the case of Frankel vs. N. Y. Life Ins. Co., 51 Fed. (2d) 933, Frankel was found unconscious on the floor at the rear end of the store with a gunshot wound in his head, which had entered over the left ear and emerged slightly higher on the right side. He was lying in a curved position, a Colt's automatic pistol beside him in a curve near the left hand, and an empty shell from the pistol on the floor at his back. Powder burns were found on the left side of his head indicating the pistol was fired at close range. He was left-handed. To fire the pistol it was necessary to have the side safety down, grip the handle and pull the trigger. The pistol could not be discharged by falling or a blow. The pistol had some blood on it.

Held the only evidence to support the theory of accident consisted of circumstances tending to show the insured had a composed mental attitude and apparently no motive for self-destruction.

It will be observed no evidence was introduced to show that it was impossible for Frankel to shoot himself.

In the case of New York Life Ins. Co. vs. Anderson, 66 Fed. 707, the facts are: Insured was found early in the morning in the basement of the store where he worked, lying somewhat on his right side, with a bullet hole in his right temple about which there were powder burns and singed hair, and a twenty-two rifle with the barrel pointing to the feet by his right side; that the insured was right-handed; had no married or financial troubles but was a heavy drinker and was quarrelsome only when drinking, and had been threatened with discharge the next time he got drunk; that he was drunk the day before and had previously talked of suicide to end his troubles; that the store had not been disturbed; insured's clothes were in order; there was no sign that he had slipped.

The rifle belonged to another employee and was kept at the store.

Held: That the evidence was compatible only with the hypothesis of suicide with rifle. It will be observed that he had talked of suicide and that there was nothing in this case to show the impossibility of committing suicide or any reason why the employee would be in the basement with the twenty-two rifle.

In the case of Fidelity and Casualty Co. of N. Y. vs. Driver, 79 Fed. (2d) 713, insured was killed by a shotgun discharged into his breast while hunting doves. Insurance company claimed suicide; widow alleged accidental death. Held the facts were sufficient to go to the jury and the jury found for the plaintiff. The case was appealed to the Circuit Court. It was reversed on appeal because of a faulty instruction

and *not* because of insufficiency of the evidence. This case instead of being an authority for the appellant in suport of its assignment of error is an authority in support of the appellee's contentions.

In the case of N. Y. Life Ins. Co. vs. Alman, 22 Fed. (2d) 98, the facts briefly are: Dr. Alman was found dead in his bedroom early in the morning. He was lying on his back diagonally across the bed with a gunshot wound about one inch below his left nipple. His left foot was on the floor and his right foot was just about touching the floor. He was in his night shirt, and his double-barrel shotgun with the butt on the floor near the right foot was leaning against the left knee. He had committed an indiscretion with his neighbor's wife a short time before and had been threatened by her husband with exposure. The jury rendered a verdict for the plaintiff and the case was appealed. The court held:

> "On appeal the plaintiff contends that it was showed by circumstances in evidence to be impossible that Dr. Alman could have fired the fatal shot because of the position of the gun, the range and size of the wound, and the lack of powder marks. *It is not denied that he could have reached the trigger either with his hand or foot* (italics ours) ; but it is said that, if he had done either, the gun would not have been between his legs, but would have fallen on the left of his left knee. The reason urged for the conclusion is that the physician who examined the body testified the wound ranged not only upward but towards the right shoulder. Arguments of this kind have very little weight, especially in the absence of reliable examination. No definite conclusion can be safely based upon the superficial examination that was made. But assuming that the wound ranged to the left of its

> entrance such a result could have been produced by placing the butt sidewise on the floor with the left foot on it to hold it in place and the trigger on the right side where the right foot would be. In this way the bend in the stock would throw the muzzle to the left and after being fired it would naturally come to rest between the legs. Dr. Alman, the insured was six feet in height, weighed two hundred pounds; the gun barrel was twenty-eight inches."

It is important to observe that in this case it was not denied that he could have reached the trigger with either his hand or his foot, which is just the opposite in respect to facts in the present case, for the reason it was demonstrated to the jury that it would be impossible for the decedent Bowman in the present case to have reached the trigger with his hand or to have pressed the trigger with his foot, because of the size of the shoes and trigger guard and the further fact there was considerable difference in the size of Dr. Alman and Mr. Bowman, and in the Alman case there was a good motive established why he would want to take his own life, which, of course, is absent in the present case.

In the case of Aetna Life Ins. Co. vs. Tooley, 16 Fed. (2d) 243, the facts are the body of the insured, shot through the temple, was found in a car which he had driven alone from his home and stopped a short distance away but out of sight from it. The bullet was of the caliber of his own revolver, not self-cocking, which lay on the seat and had recently been fired. There were powder burns in and close around the wound. There was no robbery or evidence of a struggle or an accident. He had for some time previously been in ill health, depressed

ınd despondent, though his business was prosperous and his ıome life pleasant. There was no evidence that it was impos-ible for the deceased to take his own life.

In the case of N. Y. Life Ins. Co. vs. Trimble, 69 Fed. (2d) 849, the facts briefly are that insured, who was right-ıanded, was found, shot through the head from the right to eft, with powder burns on the right temple and an automatic ıistol gripped in his right hand: that the forefinger was not esting on the trigger, but that all four fingers were clasped ıround the handle: that the clip or magazine of the pistol was on the bed about eighteen inches away from the right side ıf and between the body and the foot of the bed: that the :lip could not be released from the pistol with the forefinger while one had a firm grip on the handle: that two days before he fifteenth of the month and on the day of his death insured ent in his semi-monthly statement of his salary and remained ıt the office after his co-workers had left for the day, which was the last time he was seen alive; that there were no signs ıf struggle, nor had any of his personal effects been inter-ered with or taken away. It is very apparent that the facts n this case do not resemble in any way the facts as disclosed ıy the record in the present case.

In the case of Sugar vs. Industrial Commission of Utah, 75 Pac. (2d) 311, the facts briefly are that the decedent was found in a store in which he worked, shot through the heart. His body was found on the floor behind a counter by persons later entering the store. A .38 revolver was found on the counter at or near where he fell. An empty shell therein cor-

responded with the ball taken from his body. Powder burns were found on the clothing of the deceased and a powder burn on the counter at or near where the gun was lying. One of the deceased's pockets was pulled inside out when he was found. The cash register drawer was about half an inch open. The drawers in the safe were partly pulled out. On the floor beside him was found his wallet and two black tin cash boxes, opened or partly opened, and appearing to have been gone through. There were some insurance policies in one of the boxes and papers standing up in the drawers that were pulled out. There was evidence that the deceased's life was heavily insured, to a total of $43,000, over half of which was procured within a few months before his death, and $20,000 additional insurance had been recently applied for and refused by the insurance company. The Industrial Commission found from all the evidence that the death was by suicide rather than by accident. Appeal was taken to the Supreme Court. Held:

> "We think there is sufficient evidence to sustain the findings made by the commission. Certainly, it does not compel the opposite theory as matter of law. Granting that there is some evidence or inference favoring the applicant's theory, yet the commission was not bound to adopt that theory. It was the commission's duty to decide between the opposing theories and inferences.
>
> "Whether Industrial Commission should have in law arrived at conclusion of fact different from that at which it did arrive from the evidence, presents question of law reviewable by Supreme Court only when it is claimed that commission could only arrive

at one conclusion from the evidence, and that it found contrary to the inevitable conclusion.

"At bar that is the very question in dispute and found against by the commission."

That there were two conflicting theories and inferences that could be drawn from the evidence and the commission was at liberty to draw whichever conclusion or inference they thought proper.

It is clear that the foregoing case not only does not support the contention of appellant in this case but is directly in point so far as the position of appellee is concerned because of the fact that the only thing that the court decided in the Utah case was that there was ample evidence to justify the finding that the Industrial Accident Commission made and for that reason the order of the commission was affirmed.

In the case of Aetna Life Ins. Co. vs. Alsobrook, 299 S. W. 743, the facts briefly are: In action on life insurance policy evidence showing that barrel of shot gun must have been in insured's mouth at time it was fired; his face was bloody and a Mr. Lee who discovered him, did not at first recognize him although well acquainted with him. He made an examination and found that Alsobrook was shot in the mouth, the shot ranging from roof toward the back of head, without any visible wounds or powder burns on the outside of his face anywhere. The skull had been torn to pieces by the shot; the back of his head being mushy and soft; that the skin on the outside of the head was not broken, none of the shot passing through the head to the outside. He was shot

with a double-barrel shotgun, the right-hand barrel having been fired, the other barrel being cocked.

In the case of Fidelity Mutual Life Ins. Co. vs. Wilson, 2 S. W. (2d) 80, the facts briefly are: That insured was wounded in the mouth with a revolver and he was found in a locked hotel room; that the shooting occurred subsequent to a period of treatment at hospital for excessive drinking; that he was badly involved financially. By no stretch of the imagination can we see how this case serves any helpful purpose and clearly does not support the assignments of error made in the present case for the reason of the marked dissimilarity in the facts.

In the case of Burkett vs. New York Life Ins. Co., 56 F. (2d) 105, the evidence as stated in the case was:

> The insured's body was found lying across the cement pavement about three and a half feet from the door through which he had gone in leaving the store. The top of his head from just above his right ear was blown off. Blood and some of his brains were found on the roof, which was about eight feet high. The gun was lying on the walk about three feet from deceased's body; the butt being towards the body. It contained an exploded shell in the right-hand barrel. The shell was of a kind kept in the store for sale. The gun was a cheap one. To shoot it the hammer had to be cocked and the trigger pulled. It was usual for Mr. Jennings to keep it unloaded. He stated that he thought it was not loaded. In the rear of the store next to the concrete walk was a small open space and beyond that thick bushes and trees. Several witnesses testified that there were powder burns on the face of the deceased near the part that was blown off, and that there was a ring on the face like the mark of a gun barrel. Other

witnesses, including the undertaker who prepared the body for burial, testified that they did not see powder burns or the mark of a gun barrel on his face. The undertaker said, "There might have been some there I did not see." A gun would have to be very close, less than one foot, to one's face when fired to make powder burns on the skin. A man of the height of the insured, about five feet and seven inches, could fire the gun while in a standing position, the muzzle being so placed with reference to his person that the shot would produce the results shown by the evidence.

It will be observed that there was testimony in the case hat the insured could fire the gun while in a standing position, he muzzle being placed with reference to his person that the hot would produce the result shown by the evidence. It will e noted also that the wound inflicted was above the right ar, which would be at least six inches above the point of the hin, where the evidence showed the load entered the face of he decedent in the instant case, and a greater distance above he holes in the jumper.

In view of the fact that the other cases cited by appellant o not involve firearms and are based upon facts so entirely ifferent from the facts in this record, it is thought that it ill not aid the court to make an analysis of such cases herein.

Inasmuch as the appellant has only submitted argument in pport of assignment six and adopts such argument in sup- ort of its contention that the court erred as set forth in the ther assignments, we will adopt the argument made herein answer to all appellant's assignments of error.

In conclusion it is submitted that the evidence in this case and the reasonable inferences to be drawn therefrom were amply sufficient to support the verdict, and that the court did not err in denying appellant's motion for nonsuit and directed verdict. It is further submitted that the said verdict is not contrary to the evidence and the judgment entered thereon is not contrary to law, and that the court did not err in denying the motion for a new trial, and that accordingly the judgment entered herein should be affirmed.

Respectfully submitted,

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